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EX PARTE

Filed via ECFS

June 20, 2006

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Re: *In the Matter of Petition for Forbearance Under 47 U.S.C. § 160(c) from Application of Unbundling Rules that Limit Competitive Alternatives* -- WC Docket No. 05-170

In the Matter of Fones4All Corp. Petition for Expedited Forbearance Under 47 U.S.C. § 160(c) and Section 1.53 from Application of Rule 51.319(d) to Competitive Local Exchange Carriers Using Unbundled Local Switching to Provide Single Line Residential Service to End Users Eligible for State or Federal Lifeline Service -- WC Docket No. 05-261

Dear Ms. Dortch:

On June 20, 2006, Melissa Newman, Lynn Starr, Bob McKenna and Julie Curti, in person, and Candace Mowers, via telephone, all representing Qwest, met with Scott Bergmann. The purpose of the meeting was to discuss the Petitions for Forbearance filed in 2005 by XO Communications, Inc. and Fones4All Corp., which remain pending. During the meeting, Qwest referred to the enclosed *ex parte* dated June 19, 2006, which was prepared by Bob McKenna and Daphne Butler of Qwest concerning enhanced extended link ("EEL") service eligibility criteria and related issues.

Also enclosed is a copy of a chart that traces the evolution of the EELs criteria from the 2000 *Supplemental Order Clarification* through the present. You will note that the relevant rules, as they have evolved, have derived from the necessity for certainty in the implementation of the Commission's impairment decisions. It is apparent that elimination of the current EELs criteria (prohibition against exclusive use for long distance) would add to an incumbent local exchange carrier's unbundling obligations. We submit that elimination of the means by which such abuse is detected and policed would have the same legal impact.

This *ex parte* is being filed electronically pursuant to 47 C.F.R. §§ 1.49(f) and 1.1206(b). Please contact me at 202.429.3120 if you have any questions.

Sincerely,

/s/ Melissa E. Newman

Enclosure

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EX PARTE

June 19, 2006

Marlene H. Dortch
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Federal Communications Commission
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445 12th Street, S.W.
Washington, DC 20554

Re: *In the Matter of Petition for Forbearance Under 47 U.S.C. § 160(c) from Application of Unbundling Rules that Limit Competitive Alternatives* -- WC Docket No. 05-170

Dear Ms. Dortch:

Qwest files this *ex parte* letter in response to the letter filed by XO Communications, Inc., *et al.* (hereinafter, "XO" or "Joint Petitioners") on June 6, 2006. XO has filed a "forbearance petition" seeking to have the Federal Communications Commission ("Commission") impose greater, not lesser, regulations on incumbent local exchange carriers ("ILECs"). The new regulations would be in direct contravention of the statutory provisions of the Communications Act. As discussed herein, the XO petition is procedurally and factually deficient and must be denied in its entirety.[1]

Recent developments make the complete denial of XO's petition even more compelling. Just last week, the United States Court of Appeals for the District of Columbia Circuit issued an order upholding the Commission's *Triennial Review Remand Order*.[2] This marks the Commission's first unbundling decision to withstand appellate court review. The rules for which XO seeks "forbearance" were among the rules that are part of the Commission's successful defense. Grant of XO's forbearance petition would undercut the very affirmance that the

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[1] Qwest filed an opposition to the XO petition on Sept. 12, 2005. The arguments made therein remain valid and Qwest does not repeat them herein.

[2] *Covad Communications Co. v. Federal Communications Commission*, No. 05-1095, slip op. (D.C. Cir. June 16, 2006). *In the Matter of Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd 2533 ("*TRRO*").

Commission has long sought, and would be a direct route to return to court and further appellate review of the Commission's unbundling orders. It would also lead to the continuing uncertainty and unceasing litigation that has roiled the telecommunications industry since the passage of the Telecommunications Act of 1996.

XO's petition suffers from two fatal legal flaws, in addition to its failings on the merits. First, XO is not seeking to reduce regulation on itself, but rather to impose additional regulation on another class of carriers. Congress enacted the forbearance statute to reduce regulation, rather than to increase regulation. Thus, it is contrary to the intent of the forbearance statute to impose additional regulatory requirements through forbearance, as XO seeks to do here. Section 10 of the Act was enacted because of Congress's express recognition that, as competition developed in the telecommunications markets, regulations that made sense in the context of monopoly markets could prove counterproductive and publicly harmful when the markets were competitive. Thus, as one of a number of deregulatory measures adopted in the 1996 Act, Congress required the Commission to forbear from enforcement of any regulation or provision of the Act itself whenever three conditions were met. The first of these conditions -- just and reasonable pricing and non-discriminatory provisioning -- are the hallmarks of regulatory oversight of common carrier markets whenever market forces are not sufficient to protect the public. The second -- protection of consumers -- also relates to whether the regulation in question is necessary because, in its absence, competition will not be sufficient to provide consumers with the protection afforded by a competitive market. The third -- protection of the public interest -- is simply part and parcel of the Commission's overall statutory mandate. Section 10 was not conceived as a means whereby customers such as XO could bypass the normal statutory process for regulating providers of telecommunications by what is in essence a "double forbearance," in which the Commission is essentially asked to "forbear" from elimination of a regulation. To read such a meaning into Section 10 of the Act would make a mockery of the intention of Congress.

The competitive issues which the Commission must consider when evaluating a Section 10 forbearance petition also makes this very clear. They apply to the Commission's examination of whether a particular piece of regulation of a carrier is necessary to fulfill the purposes of that regulation. The fundamental duties of carriers to provide non-discriminatory service at reasonable rates can be ensured by competition as well as by regulation, as Congress well understood in enacting Section 10. Could XO "prove" that the regulation it seeks "forbearance" from is necessary to ensure that it (XO) will price reasonably and offer service in a non-discriminatory manner? Merely asking the question documents its absurdity, as the regulations do not apply to XO at all.

In point of fact, XO's petition itself points out this fundamental flaw. When called upon to justify why the regulation for which "forbearance" is sought is not necessary to ensure just, reasonable and non-discriminatory carrier rates, XO essentially argues that the *TRRO* was erroneously decided.[3] While obviously we dispute this conclusion, even if it were correct it

[3] *See* XO petition at 7-12, 20-21, 24-25.

would have nothing to do with meeting the first criterion for forbearance. The same is true of XO's claim that its petition meets criteria two and three.[4] XO's claim is not that the portions of the existing rules are necessary to protect the public, it is instead that additional rules are allegedly necessary to protect XO.

If XO were able to prove that the regulations that it seeks to reimpose through "forbearance" indeed were necessary to protect XO under Section 251(d) of the Act, there are numerous proper procedural means available to try to convince the Commission of the righteousness of its position. Forbearance is not one of them. Forbearance can be used to eliminate regulations applicable to a petitioning carrier. The device of forbearance cannot be used to impose or increase regulatory burdens on those very carriers it was meant to protect.

Second, XO's requested relief violates Section 251 and the court decisions implementing that statutory provision. XO, as the proponent of unbundling, bears the burden of showing impairment before the Commission can impose unbundling.[5] As Verizon and others have demonstrated, the rules from which XO seeks forbearance are not exceptions or limitations on unbundled network elements ("UNE") obligations. Rather, they embody findings of non-impairment by the Commission. Thus, for example, there is no longer a general obligation to provide unbundled DS1 loops everywhere. Similarly, the limitation on obtaining more than ten UNE DS1 transport circuits on a route reflects the Commission's judgment that a requesting carrier is not impaired when it seeks more than ten DS1 transport circuits on a single route. Finally, the enhanced extended link ("EEL") eligibility criteria are specifically related to the finding of no impairment in the long distance and wireless product markets. Thus, before ordering the unbundling that XO seeks, the Commission would have to address whether the impairment criteria have been met for these facilities without the limitations currently in place under the Commission's rules.

In its *ex parte* presentation dated June 6, 2006, XO claims that it is not possible to distinguish between its requested forbearance and the forbearance granted in the *Qwest Omaha Forbearance Order*.[6] Specifically, XO relies upon the Commission's statement that "the Commission's unbundling analysis does not bind our forbearance review."[7] There are, however, two important distinctions, between Qwest's forbearance petition and XO's requested relief. First, Qwest's Omaha Petition was a proper forbearance petition, predicated on the fact that Qwest's market share in Omaha had been reduced to well below fifty percent. Unlike the *Qwest*

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[4] *Id.* at 12-19, 21-24, 25-27.

[5] *Covad*, slip op. at 36.

[6] XO June 6 *ex parte* at 1-2.

[7] *In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical* Area, Memorandum Opinion and Order, 20 FCC Rcd 19415, 19446-47 ¶ 63 (2005) ("*Qwest Omaha Forbearance Order*"), *appeals pending sub nom., Qwest Corp. v. FCC*, No. 05-1450 (D.C. Cir.).

Omaha Forbearance Order, XO is requesting the adoption of *additional* unbundling requirements. Second, the statutory scheme that governs forbearance from the unbundling rules is explicit -- the Commission cannot apply the forbearance criteria to a petition seeking unbundling relief until after the petitioning carrier has "fully implemented" Section 251(c). There is no statutory provision that permits forbearance to be used to circumvent the requirement that unbundling can only be imposed following a specific finding of impairment. In fact, any such attempt would be in decided violation of the D.C. Circuit's decision in *USTA I*.[8] Moreover, while the Commission could not lawfully have denied the Omaha Petition based solely on an impairment analysis in deciding to eliminate certain unbundling requirements in the Omaha metropolitan statistical area ("MSA"), the Commission did consider whether the aims of Section 251(c)(3), such as the development of facilities-based competition, had been met in Omaha. Here, XO is asking the Commission to impose unbundling even where the Commission has specifically found that requesting carriers are not impaired without access to UNEs, and that it is therefore unnecessary for ILECs to bear the costs of unbundling.

Legal deficiencies aside, XO has not demonstrated any grounds upon which it could justify upsetting the Commission's impairment regulatory scheme. The tests from which XO wants the Commission to forbear are the results of the Commission's impairment analysis in the *TRRO*. XO may not like the results of the Commission's decisions, and has so conceded in its petition. With the exception of its attack on the EELs criteria (where XO claims that the AT&T and Verizon mergers should cause the Commission to reconsider its decision), XO has not even attempted to show changed circumstances from the adoption of the rules in the *TRRO*. The petition fails on the merits even as an untimely and procedurally improper petition for reconsideration.

1. EELs Service Eligibility Criteria

Contrary to XO's argument in its June 6, 2006 *ex parte*, Verizon's acquisition of MCI and the former SBC's acquisition of AT&T did not render moot any concerns about the conversion of legacy interexchange carrier ("IXC") special access circuits.[9] Even if the Verizon and AT&T mergers granted circuit flipping protection to those companies (a highly dubious assumption by itself), similar protection was not obtained by Qwest and hundreds of other ILECs that were not parties to those mergers. Any change in circumstance has been superficial, at best. The Commission has realized the ease with which EELs and commingled loop-transport circuits could be used in place of special access. The Commission made clear in the *TRO*, where the service eligibility criteria were outlined that their purpose was to enforce the longstanding rule that EELs could not be used exclusively for services for which there has been no finding of impairment, *i.e.*, long distance and wireless services.[10] The Commission recognized that EELs

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[8] *USTA v. FCC*, 290 F.3d 415, 425 (2002).

[9] XO June 6 *ex parte* at 3.

[10] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the*

and commingled loop-transport circuits presented unique incentives for gaming -- obtaining access to these circuits for the exclusive provision of non-local services "in order to obtain favorable rates or to otherwise engage in regulatory arbitrage."[11] The Commission therefore determined that special rules (*i.e.*, the service eligibility criteria) were necessary to prevent such gaming.

Nothing has changed in this regard. In implementing the service eligibility criteria, the Commission attempted to use its judgment and analysis to balance what it found to be the competitive local exchange carriers' ("CLECs") need for EELs and commingled circuits where they would otherwise be impaired, and the need for an administrable rule to prevent the use of these circuits for services for which there is no impairment.[12] This settled a longstanding dispute between ILECs and CLECs over the application and administration of use restrictions on high-capacity EELs.[13] ILECs, such as Qwest, had advocated no circuit flipping at all under the theory that if a carrier had been using special access, then it obviously was not impaired without access to the UNE. The CLECs had advocated a circuit flipping free for all without any limiting criteria. The service eligibility criteria represent the Commission's attempt to adopt bright line rules that would allow CLECs to obtain access to these high-capacity circuits in an easily administrable manner, while addressing the ILECs' legitimate interest in preventing gaming. XO seeks to upset this balance.[14]

While Qwest does not believe that there are enough teeth in the service eligibility criteria, they at least present minimal bright line requirements that a CLEC must satisfy to show that the requested circuit is capable of providing local voice service. First, the service eligibility criteria require the requesting carrier to be certified to provide local voice service, *i.e.*, the service for which the Commission made the impairment finding. Second, the requesting carrier must have at least one local number assigned to each circuit and must provide 911 or E911 capability to each circuit. This is further evidence that the circuit is capable of serving a local end user. Third, there must be circuit-specific architectural safeguards: each circuit must terminate into a collocation at an ILEC central office within the same LATA as the customer premises; each circuit must be served by an interconnection trunk in the same LATA as the customer premises;

Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17351 ¶¶ 590-91 (2003) (subsequent history omitted).

[11] *Id.* at 17351 ¶ 591 (noting "potential for 'gaming' . . . that is uniquely possible because of the technical characteristics of these facilities.")

[12] *Id.* at 17350-66 ¶¶ 590-619.

[13] *Id.* at 17351-52 ¶ 592.

[14] Notably, this portion of the *TRO* was supported by all of the Commissioners at that time, including Chairman Martin, and Commissioners Copps and Adelstein.

there must be at least one active LIS trunk for each 24 DS1 EELs; and there must be a Class 5 switch or other switch capable of serving local voice traffic. The architectural safeguards show that the EEL is capable of being used for voice services, that there is local two-way traffic, and that the traffic does flow onto the CLEC's network. In the absence of these criteria the doors would be wide open for arbitrage.

If the Commission were to "forbear" from the service eligibility criteria and alter its impairment analysis through forbearance, it would leave a substantial void in its rules, which would quickly be filled with disputes, litigation, and a likely need for the Commission to revisit the EELs issues in the future. In the absence of the bright line requirements reflected in the service eligibility criteria, ILECs and CLECs would have to fashion their own means of implementing the prohibition on the use of EELS exclusively for the provision of long distance and commercial mobile radio services. This would lead to a situation where administrative, judicial and carrier resources were wasted through audits and litigation over the use to which CLECs were putting the EELs, exactly the harms the Commission was trying to reduce through the adoption of the service eligibility criteria. Furthermore, in the absence of the service eligibility criteria, there would be no bright lines to guide an audit. Carriers would need to fall back to something similar to the local usage tests that applied prior to the *TRO*, where CLECs had to show that a certain percentage of their traffic was local. The point is, there must be some meaningful guidelines to permit ILECs to avoid unlawful use of special access UNEs. There is no principled basis for eliminating the current guidelines, certainly not without replacing them with something else. Accordingly, increasing the unbundling obligations of ILECs by removing the EELs' eligibility requirements would not be in the public interest, and would not be a reasonable decision even if properly presented to the Commission.

2. DS1 Loop Impairment Test

The Joint Petitioners also request that the Commission "forbear" from applying its wire center-based impairment test to DS1 loops used to serve "predominantly residential" and "small office buildings" where, they argue, demand does not economically justify the deployment of any loop facilities.[15] Fundamentally, the Joint Petitioners want a blanket finding of impairment for predominantly residential and small office buildings, thus reversing the *TRRO's* finding of non-impairment. The Commission did not make such a nation-wide finding, and specifically rejected proposals to reach national findings.[16] In the absence of a new impairment finding for DS1 loops, there can be no unbundling for predominantly residential and small office buildings. A new impairment analysis would be required. Moreover, the D.C. Circuit just upheld the Commission's DS1 loop impairment test, an admittedly imperfect measure of competition, over the CLECs' objections that the test was insufficiently granular to predict competition for mass-market consumers.[17] Elimination of this test would resurrect the concerns that led the

[15] XO Reply to Oppositions, filed Oct. 12, 2005 at 7.

[16] *TRRO*, 20 FCC Rcd at 2624-25 ¶ 165.

[17] *Covad*, slip op. at 29-30.

Commission to reject a building-by-building test in the *TRRO*, and led in part to the D.C. Circuit's earlier vacation of the *TRO*.[18] As is the case with the EELs analysis, even if properly presented to the Commission, XO has not shown any reason to increase the unbundling burdens on ILECs through adding these facilities to the list of facilities subject to mandatory unbundling.

3. DS1 Transport Cap

The Joint Petitioners request that the Commission "forbear" from the cap on use of UNEs for DS1 transport. As the D.C. Circuit found in upholding the limitation on DS1 transport, "the FCC's impairment inquiry centered on the potential for CLECs to self-deploy DS1 transport."[19] The cap arises because the cross-over point at which it becomes economical to order a DS3 occurs at about 10 DS1 UNEs. Thus, where DS3 UNEs are not available because they are not impaired, a requesting carrier may not order more than 10 DS1 UNEs in order to avoid gaming of the system by ordering multiple DS1 UNEs due to the unavailability of DS3 UNEs. XO's petition contains no basis for the Commission to depart from these conclusions in the *TRRO,* certainly not in the context of a procedurally unlawful forbearance petition.

For these reasons, and those Qwest had previously set forth, the Commission should deny these petitions.

Respectfully submitted,

QWEST COMMUNICATIONS
INTERNATIONAL INC.

/s/ Robert B. McKenna
/s/ Daphne E. Butler

[18] *TRRO*, 20 FCC Rcd at 2620- 22 ¶¶ 157-59.

[19] *Covad*, slip op. at 33.

Enclosure -- Qwest *Ex Parte*, WC Docket Nos. 05-170 and 05-261

Comparison of Service Eligibility Criteria for High-Capacity Enhanced Extended Links -- *Supplemental Order Clarification, Triennial Review Order* and *Triennial Review Order on Remand*

FCC Release	Eligibility Criteria/Categories
06/02/00 *Supplemental Order Clarification* (FCC 00-183) (at ¶ 22)	FCC defines the "significant amount of local exchange service" that a requesting carrier must provide in order to obtain unbundled loop-transport combinations; the criteria include: • The requesting carrier certifies that it is the exclusive provider of an end user's local exchange service; the loop-transport combinations must terminate at the requesting carrier's collocation arrangement in at least one incumbent LEC central office. • The requesting carrier certifies that it provides local exchange and exchange access service to the end user customer's premises and handles at least one third of the end user customer's local traffic measured as a percent of total end-user customer local dial tone lines; and for DS1 circuits and above, at least 50% of the activated channels on the loop portion of the loop-transport combination have at least 5% local voice traffic individually, and the entire loop facility has at least 10% local voice traffic. When a loop-transport combination includes multiplexing (*e.g.*, DS1 multiplexed to DS3 level), each of the individual DS1 circuits must meet this criteria. The loop-transport combination must terminate at the requesting carrier's collocation arrangement in at least one incumbent LEC central office. This option does not allow loop-transport combinations to be connected to the incumbent LEC's tariffed services. • The requesting carrier certifies that at least 50% of the activated channels on a circuit are used to provide originating and terminating local dial tone service and at least 50% of the traffic on each of these local dial tone channels is local voice traffic, and that the entire loop facility has at least 33% local voice traffic.

FCC Release	Eligibility Criteria/Categories
08/21/03 *Triennial Review Order* (FCC 03-36) (at ¶¶ 597, 624, 626)	Requesting carrier must have a state certification of authority to provide local voice service.
	Requesting carrier must have at least one local number assigned to each circuit and must provide 911 or E911 capability to each circuit.
	Additional circuit-specific architectural safeguard requirements: • Each circuit must terminate into a collocation governed by Section 251(c)(6) at an incumbent LEC central office within the same LATA as the customer premises. • Each circuit must be served by an interconnection trunk in the same LATA as the customer premises served by the EEL for the meaningful exchange of local traffic and for every 24 DS1 EELs, or the equivalent, the requesting carrier must maintain at least one active DS1 local service interconnection trunk. • Each circuit must be served by a Class 5 switch or other switch capable of providing local voice traffic.
	A requesting carrier must certify to the above service eligibility criteria in order to demonstrate that it is a *bona fide* provider of qualifying service; and incumbent LECs can obtain and pay for an independent auditor to audit, on an annual basis, compliance with the above qualifying service eligibility criteria.
02/04/05 *Triennial Review Order on Remand* (FCC 04-290) (at ¶¶ 174, 178)	For DS3-capacity loops, the FCC adopted a proxy test that does not unbundle DS3 loops in any building served by a wire center with at least 38,000 business lines and four fiber-based collocators.
	For DS1-capacity loops, the FCC adopted a proxy test that does not require unbundling in any building served by a wire center with at least 60,000 business lines and at least four fiber-based collocators.